

S/N 14/2015 – Failing to Conduct Due Diligence in Checking Deadline for Exercise of the OTP

Facts of Case

In July 2012, the buyer had engaged his sister, P to find him a property to purchase. P, her husband, C and the Respondent were salespersons of the same estate agent.

P had arranged with the sellers' salesperson, Q to view a private condominium ("**the Property**") on 29 July 2012 ("**the 1st viewing**"). The buyer attended the 1st viewing and made an offer of \$1.18 million for the Property. This was communicated by P to Q via telephone. The offer was rejected by the sellers.

The buyer remained keen to purchase the Property, and engaged C to represent him in August 2012. As C was less experienced, it was agreed that another salesperson, the Respondent would be involved in the purchase of the Property. It was not known to the buyer that the Respondent was C's colleague and superior, and that he had to pay an overriding fee to the Respondent.

The Respondent then obtained the sellers' contact number from P and contacted them on 8 August 2012. One of the sellers, B, informed him that the other seller, A, was away and gave him A's contact number. On 14 August 2012, the Respondent contacted A and informed him that he had a potential buyer for the Property and requested a viewing on the same day ("**the 2nd viewing**"). The Respondent also expressed his interest in representing sellers in the transaction. A said that he would allow the Respondent to represent them and earn commission if the potential buyer purchased the Property.

The buyer, his wife, P and C attended the 2nd viewing. After the 2nd viewing, the buyer made an offer of \$1.25 million. C conveyed this offer to the Respondent who then informed A on the same night. A agreed to sell the Property at that price to the buyer.

On 14 August 2012 at about 10pm, the Respondent, P and C met the buyer at his workplace to sign an Offer to Purchase ("**the Offer Letter**") that C had prepared. The Respondent and C had indicated that the option period was 14 days, the completion period was 8 weeks and that the sellers had until 16 August 2012 to accept the Offer Letter.

When the buyer signed the Offer Letter, it was communicated to him by the Respondent and C that he had 14 days from the date of the Option to Purchase to exercise the Option to Purchase. After signing the Offer Letter, the buyer handed the Offer Letter and a cheque for 1% of the purchase price ("**the Option Money**") to the Respondent.

Upon receiving the signed Offer Letter, the Respondent prepared the Option to Purchase on his own. He mistakenly copied the Offer Expiry Date onto the Option to

Purchase such that the Option period was stated to expire on 16 August 2012 at 4pm instead of 29 August 2012 (14 days after the Option to Purchase had been issued).

On 15 August 2012 around 5pm, the Respondent met A to pass him the Option to Purchase, the Option Money and a non-exclusive estate agency agreement ("**the NEAA**") dated 15 August 2012 appointing him as the sellers' salesperson. The Respondent did not go through the terms of the various documents handed to the sellers. On the same day, A had to seek the help of Q to explain the documents to him. Several amendment were made to the Option to Purchase and the sellers signed it as well as the NEAA. The signed documents were then passed to the Respondent on the same day.

On 16 August 2012 at 3pm, the Respondent met A and questioned him about why the commission was only 1%, and not 2% in the NEAA. Eventually the Respondent gave up pursuing the matter and left. At no point during the discussion about the NEAA did the Respondent inform A that he was C's superior and that he would be getting an overriding fee from C's commission. On the same day, the Respondent and C entered into a co-broking agreement to equally share the commission of 1% that the Respondent was collecting from the sellers. This was on top of the overriding fee that C had to pay to the Respondent.

On 16 August 2012 at around 3.30pm, the Respondent passed the signed Option to Purchase to C at their estate agent's head office. At 4pm, C passed the signed Option to Purchase to the buyer. C failed to notice that the deadline to exercise the Option to Purchase was 16 August 2012 at 4pm, much less alert the buyer to that fact or that the Option to Purchase had already lapsed by then.

As such, not knowing that the Option to Purchase had expired, the buyer met his banker to process the loan for the purchase of the Property. The banker was passed the Option to Purchase.

On 24 August 2012, the buyer's banker informed him that there was an error in the deadline to exercise the Option to Purchase. The buyer was also informed by his solicitors that the Option to Purchase had expired and that the deadline to exercise the Option to Purchase should have been 29 August 2012, not 16 August 2012.

The buyer informed C and P about the error and they in turn contacted the Respondent, asking him to clarify with A. A was not contactable as he was travelling overseas.

On 26 August 2012, the Respondent told the buyer that the sellers were amenable to cancelling the transaction and refunding the Option Money. On 27 August 2012, the buyer lodged a caveat on the Property. On the same day, the sellers granted an option to purchase to another buyer who had offered \$1.27 million ("**the new option**"). The new option was to be exercised by 10 September 2012.

On 28 August 2012, the buyer, the Respondent and C approached B (as A was still overseas) to attempt to exercise the Option to Purchase. B refused.

On 29 August 2012, the Respondent and C presented a cheque from the sellers to the buyer refunding the Option Money in exchange for withdrawing the caveat. The buyer refused to accept the cheque as it was post-dated to 10 September 2012.

The new option was exercised by the new buyers on 7 September 2012.

As a result, the buyer and sellers were involved in a civil suit where the sellers sought to remove the caveat, and the buyer counter-claimed for specific performance of the Option to Purchase. On 26 April 2013, the Court ordered the caveat to be lifted and denied the buyer specific performance of the Option to Purchase. The buyer also had to pay costs to the sellers and did not receive a refund of the Option Money in the sum of \$12,500.

Charges

The Respondent faced the following 3 charges:

Charge 1

For failing to conduct his work with due diligence, dispatch and care by erroneously writing the wrong deadline to exercise the Option to Purchase without checking that it was correct (16 August 2012 instead of 29 August 2012), jeopardizing the buyer's chance of exercising the Option within the time he had stipulated in the Offer to Purchase and thereby resulting in the sale not proceeding altogether, in contravention of paragraph 5(1) of the Code of Ethics and Professional Client Care.

Charge 2

For continuing to act on behalf of his clients, the sellers, where to do so would place his interests in potential conflict with those of his clients, and without declaring in writing, or at all, the potential conflict of interest that he was the superior of the buyer's salesperson and he would be collecting an overriding fee (arising from the co-broke commission which he would be paying to the buyer's salesperson) from the buyer's salesperson, in contravention of paragraph 13(1) read with paragraph 13(2)(a) of the Code of Ethics and Professional Client Care.

Charge 3

For asking his clients, the sellers, to sign a form without explaining the meaning and consequences of the provisions of the form, by not explaining the Option to Purchase and the NEAA before his clients signed those documents, in

contravention of paragraph 8(2) of the Code of Ethics and Professional Client Care.

Outcome

The Respondent pleaded guilty to Charge 1 with Charges 2 and 3 taken into consideration for sentencing, and the Disciplinary Committee imposed the following financial penalties and disciplinary orders on the Respondent:

Charge 1: A financial penalty of \$4,000 and a suspension of 18 weeks.

Fixed costs of \$1,000 was imposed on the Respondent.